# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

CALIFORNIA ALMOND GROWERS EXCHANGE d/b/a BLUE DIAMOND GROWERS

and Case 20-CA-32583

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 17, AFL-CIO

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Jerrold C. Schaefer, Esq., and Molly A. Lee, Esq., (Hanson, Bridgett, Marcus Vlahos & Rudy) of San Francisco, California, for Respondent.

Jennifer A. Jambor, Esq., (Leonard Carder) of Oakland, California, for the Union.

#### **DECISION**

#### Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I heard this case in trial at Sacramento, California on December 5 through December 8, 2005. On June 29, 2005, International Longshore and Warehouse Union, Local 17, AFL-CIO, (the Union) filed the charge in Case 20-CA-32583 alleging that California Almond Growers Exchange d/b/a Blue Diamond Growers (Respondent) committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the Act). The Union filed the amended charge on August 19, 2005. On October 27, 2005, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent alleging that Respondent violated Section 8(a)(1) and (3) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses<sup>1</sup> and having considered the post-hearing briefs of the parties, I make the following:

#### Findings of Fact and Conclusions

#### Jurisdiction

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Respondent, a California corporation with an office and place of business in Sacramento, California, has been a grower-owned cooperative engaged in processing and selling almonds and almond products on a non-retail basis. During the twelve months prior to issuance of the complaint, Respondent sold and shipped goods valued in excess of \$50,000 directly to customers located outside the State of California. Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. The Alleged Unfair Labor Practices

# A. Background and Issues

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The complaint alleges that Respondent through its supervisors, on numerous occasions, threatened its employees with loss of benefits and plant closure if they selected the Union as their bargaining representative. The complaint also alleges that Respondent's supervisors, on numerous occasions, interrogated employees about their Union sympathies and made certain promises of benefits to discourage Union activities. The complaint further alleges that Respondent unlawfully discharged employees Ivo Camilo, Mike Flores, and Amado Sabala, and unlawfully disciplined employee Alma Orozco in order to discourage union membership and activities.

35 B. <u>Facts</u>

# 1. The Alleged Section 8(a)(1) Statements

Respondent, a California corporation, is a cooperative of almond growers with a manufacturing facility in Sacramento, California. It is engaged in the business of processing and selling almonds and almond products on a non-retail basis. There are approximately 600 production and maintenance employees at the Sacramento facility.

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<sup>&</sup>lt;sup>1</sup> The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

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In August 2004, the Union held a series of meetings with some of Respondent's employees interested in Union representation. Thereafter, Augustin Ramirez, an international organizer for the Union held five meetings with employees, from September to December 2004, during which Ramirez gathered information prior to commencing an organizing drive. However, Ramirez did not begin an official organizing drive because he did not believe he had sufficient interest from the Employer's workforce.

On October 21, 2004, Respondent sent a letter to employees' homes asserting that selecting the Union as their bargaining representative would erode employer-employee relations and undermine Respondent's market competitiveness. Respondent further sought to discourage employees from signing union authorization cards. The General Counsel does not contend that the October 21, 2004, letter contains any unlawful statements.

On or about January 29, 2005, Ramirez held a meeting with employees where he sought volunteers for an organizing committee. Approximately 75 employees attended this meeting and over 35 employees agreed to be part of the organizing committee. Based on this showing of interest, Ramirez began what he termed an official organizing drive. Ramirez held four more employee meetings between February and early March with employees to discuss possible Respondent reaction to the organizing drive.

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In January Respondent began to react to the organizing drive. From January to early May, Respondent sent numerous letters, bulletins, and fliers and held numerous group and one-on-one meetings with employees expressing its opposition to the Union and the Union's organizing drive.

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On March 26 Ramirez organized a Cesar Chavez march in Southside Park in Sacramento. More than 50 employees participated, wearing yellow t-shirts with the Union's logo. Employees also held up signs stating, "Blue Diamond Workers Unite, Respect for Hard Work Is All We Ask". The event was covered by local media, coverage that was viewed by Respondent's management staff.

On April 15 Ramirez organized another rally in front of Respondent's facility. Approximately 80 employees participated. During the rally employees marched to the front gate and presented a letter from the Union stating that the Union was seeking to organize the employees at the Sacramento facility and naming 58 employees as belonging to the organizing committee. Ivo Camilo, Mike Flores. Alma Orozco and Amado Sabala, the alleged discriminates in this case, were all listed as members of the organizing committee.

Thereafter, on April 28, Respondent filed a representation petition in Case 20-RM- 2857 and a charge in 20-CP-1078 seeking an expedited election. However, the Union disclaimed interest in representing the employees and the petition and charge were dismissed on May 9, 2005.

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As mentioned above, Respondent began campaigning against the Union in January 2005. Employee Michael Vaughn testified that department manager Dwight Davis held a meeting with employees in the receiving department in January in which he discussed the Union. Davis told employees that if the Union came in, the employees would probably not receive the raise scheduled for September 2005 because the raise would be under negotiation.<sup>2</sup> Davis said that as a result of negotiations, employees' wages could go up or down. At a meeting in February, Davis cautioned employees against signing anything for the Union as they might be voting for the Union without their knowledge. An employee asked Davis whether Respondent would close its doors if the Union came in. Davis answered, "Anything is possible." Employee Curtis Merjil testified that he attended a meeting held by Davis in January at which the proposed September raises were mentioned. Davis stated that if the Union came in, the employees might not get their raises. Davis testified that he told employees that Respondent would freeze wages and benefits if they selected the Union as their bargaining representative. Davis read a flier which stated that Respondent had "determined that a wage rate change is appropriate" and that employees would receive the increase some time that summer. According to Davis, he stated, "It's my understanding if the Union comes in, it would go to collective bargaining, we would have to freeze everything because it would be considered a bribe, and once it gets to collective bargaining, you need to understand it can go up or down." During this meeting, an employee asked whether the plant would close down if the employees selected the Union. Davis responded "anything's possible." Davis made this comment on more than one occasion.

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Employee Violet Renslow testified that in February during a meeting, area manager Don King said that employees would lose their benefits if the Union came in. King said, "You would lose everything. It's all re-negotiable." Patricia Senteney testified that King said that if the Union came in, employees would lose their wages and pension. According to Senteney, King also stated that if the Union got in, the plant would close its doors.

Employee Ivo Camilo testified that senior production manager Ron Lees told him, "Well, I heard that the union tried to get in ". Camilo answered that the employees had not had a raise for some time and that Camilo felt that his \$10 per hour was the equivalent of minimum wage. According to Camilo, Less answered, "Well. If the Union gets in you can worry about it, the Union succeeds worry about the job, mine included."

Amado Sabala testified that in mid-January, he was approached by department supervisor Francisco Corral in the computer room. Corral said that he had been told to talk to Sabala about the Union. Sabala said he thought having the Union represent the employees was a good idea. Corral answered that Respondent wouldn't allow the Union to do so. Sabala said the employees should have a right to hear from the Union and Corral answered that he did not have a problem with that.

<sup>&</sup>lt;sup>2</sup> Respondent contends that no wage increases were scheduled. However, the flier dated January 27, 2005, from Kim Kennedy, Respondent's general manager, stated, "Based on our preliminary assessment, we have determined that a wage rate change is appropriate. The final rate for each position will be dependent on the job descriptions, our internal leveling, and our wage market data. The wage project should be completed sometime this summer." The flier also contained the statement that "We have determined that it is appropriate that Blue Diamond adopt a program of annual wage increases. This chane in philosophy allows Blue Diamond (as part of the annual budget process) to determine what amount of increase is appropriate annually." Finally, the last sentence states that the effective date for implementing these changes would be in conjunction with Respondent's new fiscal year, September 2005.

Sabala testified that in mid-February Corral approached him and employee Marcus Johnson. Corral asked if anyone approached the employees about signing anything for the Union. Johnson said he had heard bits and pieces about the Union and then left. Sabala mentioned that he had been a Union member in the past. Corral asked whether the Union had sent Sabala. Sabala answered no.

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Employee Alma Orozco testified that supervisor Matt Orlousky asked what she thought about the Union. Orozco answered that her daughter received better benefits than she even though she, Orozco, had worked for the Employer for several years.

Supervisor Kathy Manzer testified that she told employees during a meeting in February that "employees who were members of a collective bargaining agreement would not be able to participate in the pension plan." She also told the employees that the "benefits that they had at the time of union representation would be frozen at that time, and then would be negotiated, that the pension plan as they knew it would no longer exist, based on the information I had from the company." Manzer handed out a flier which included the following question and answer:

- Q: Will I be eligible to continue participation in Blue Diamond's pension plan if I am represented by a union?
- A: No. Blue Diamond's pension plan has a provision about who is eligible to participate in the plan. It says, ". . . . the following classes of employees shall not participate in the plan . . . . an employee who is a member of a collective bargaining unit. . . ."

Matt Orlousky also held a meeting with employees about the pension plan. Tr. 158-159. Orlousky using the same flier as Manzer told employees, "It is my understanding our pension plan, as written, members of the collective bargaining agreement [are) not eligible to participate in our pension plan. In April, Ted Stockton also discussed the pension plan with employees. According to Stockton he said, "If the Union came in, the Blue Diamond pension would be frozen, it would not be lost but it would still be there. Stockton further said that "some employees would have to be vested again," if the Union were voted in. Stockton used the same flier as Manzer, and Orlousky.

Employee Jim Bizallion testified that Ginger Tanaka, a human resources representative, told employees at a meeting that the day a collective-bargaining agreement was signed, the employees' pension through Respondent would stop. Tanaka also said that employees would have to work five years to vest in the Union's pension plan. Employee Randy Reyes testified that Tanaka stated that if the Union came in, Respondent's pension plan would stop and that there would be a negotiation. She said that employees would have to wait five years to vest in the Union's pension plan. Tanaka did not testify.

Camilo testified that in March, supervisor Martin Basquez told him that if the Union got in, the Employer would change its name or move. Employee Larry Newsome testified that in April, Basquez asked why he was wearing a Union t-shirt and then said, "you know if the Union comes in they have the right to fold up or shut the plant and relocate." Basquez then walked away. Alejo (Alex) Cabalona testified that while he and Newsome were in the cafeteria Basquez said, "I don't know why you guys want the Union, the company has a right to shut it down." Basquez denied talking to these employees but admitted telling family members that the Employer would shut down if the Union came in. I credit the testimony of Newsome and Cabalona.

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Employee Geri Daveiga testified that in April leadman Scott Moore asked Daveiga, Dora Wagner and Monique Marquel, why the employees wanted the Union. Moore wrote down their responses and said he would present it to the manager of quality control. Moore said that if the Union came in, the plant could shut down. Dora Wagner also testified that Moore asked why the employees wanted the Union and what the Employer could do to make things better; Moore wrote down the employees' comments. Moore said he would present these to the department head. Wagner also testified that Moore said that if the Union came in, Respondent would shut down the plant. Moore did not deny these comments.

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Employee Ann Hurlbut testified that in April test room supervisor Janice Peterson called her into a meeting with three other employees. Peterson said that the Union had raised its ugly head again and was trying to organize Respondent. Peterson said that if the Union came in, Respondent would take away wages and benefits and that bargaining would start from nothing, everything would be negotiated. Peterson added that employees could wind up with less in wages and benefits than they currently received. Peterson asked what the employees thought about the Union and Hurlbut answered, "If the election was held tomorrow, I would vote yes for the Union." Peterson did not testify.

Employee Cesario Aguirre testified that leadman Eugene Spyksma called him into a meeting with Basquez, Dan Ford, and Chris Silva on May 5.3 Tr. 190. Basquez handed Aguirre a flier about the Union. Aguirre said you know where I stand and Basquez asked if there was anything that could change Aguirre's mind. Aguirre answered that he did not think so. Basquez and Aguirre then discussed Aguirre's unhappiness with his loss of benefits. Basquez stated that Aguirre should have resolved these issues prior to returning to work. Aguirre answered that Respondent had not been fair. Aguirre mentioned that he favored the Union even before his accident and Ford asked what Aguirre thought the Union could do for him. Aguirre answered better treatment and better wages. Ford answered that if the Union came in, negotiations start and everything starts from zero. Ford then asked whether Aguirre was willing to take that chance. Ford said if the Union comes in, it will drive away the growers. Aguirre said he was willing to take that risk. Silva asked whether Aguirre was willing to risk his pension. Ford said, if the Union comes in, the employees' pension will freeze immediately. Aguirre did not respond. Aguirre spoke about employee unhappiness with certain company policies. The supervisors said the company was working on that and Ford stated that there would be a substantial wage increase in September. Silva asked Aguirre how the employee would vote, if the election were held the next day. Aguirre said he would vote against it because "we are not ready for an election." Shortly after this meeting, Aguirre wrote down certain notes of the highlights of the meeting. Based on Aguirre's demeanor and the corroboration of his notes, I credit Aguirre's version of his conversation with these supervisors.

2. The Terminations of Camilo, Flores and Sabala and the Discipline of Orozco.

Respondent has written procedures for disciplining and terminating employees in its employee handbook. Under Respondent's "Rules of Conduct" there are two types of violations; those which result in immediate suspension and possible termination and those which result in a written warning. However, employees may be terminated if they receive three written warnings in 12 months or six written warnings in 36 months. In the three discharges at issue herein, I find that

<sup>&</sup>lt;sup>3</sup> According to Basquez, the meeting was to discuss Aguirre's unhappiness with the loss of certain benefits due to injury. Aguirre had already discussed the matter with human resources and there was nothing Basquez could do to help Aguirre. I find the purpose of the meeting was to discuss the Union.

the employees engaged in violations of the rules of conduct. The issue in each case is whether, absent union considerations, the employees would have been issued warnings or discharged.

In addition to the written warnings mentioned above, Respondent also issues "coachings" both written and oral to employees, whereby a manager counsels an employee regarding a performance problem. Respondent contends that the written coaching given to Orozco did not rise to the level of discipline. However, in other instances, coachings were relied on to determine the level of subsequent discipline. In such instances coachings appear very much like warnings.

Ivo Camilo was a 35-year employee with an excellent work history. Camilo attended Union meetings and was listed as a member of the Union's organizing committee. Camilo's support of the Union was well known by his supervisor Ron Lees.

On April 18 Camilo was concerned that the almonds on the machine he was operating were stacking too high. Camilo asked for assistance. Employee Janet Brady-Fox and leadperson Joy Mattos came to assist Camilo. Mattos showed Brady-Fox how to move the almonds into the scales to prevent the almonds from stacking too high. After Mattos left Camilo went to assist Brady-Fox. While Camilo was moving the almonds and showing Brady-Fox how to move the almonds around the machine, Brady-Fox noticed blood on the machine and on Camilo's hand. Brady-Fox called the blood to Camilo's attention. Camilo placed pressure on the scratch on his hand and wiped his hand. However, Camilo did not stop the machine, clean the machine and take the proper precautions to assure that no blood contaminated the product. Neither Camilo nor Brady-Fox reported this incident to Respondent's supervision as required by Respondent's "Good Manufacturing Practices."

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That evening the maintenance crew found traces of blood on the machine. The traces of blood were reported to Lees the following morning. Lees approached Camilo and asked whether anybody cut a finger on the machine. Camilo thinking that Lees meant a severed finger said no, not thinking of the scratch on his finger. Lees then questioned Brady-Fox who told Lees that Camilo had bled on the machine and his hand.

Lees went back to Camilo and questioned Camilo why he had not mentioned the scratch and blood on his hand. Camilo said that Lees had only asked about a cut or severed finger. Lees and Camilo then argued about what Lees had asked. Lees then asked Brady-Fox to write out a statement of what had occurred. Brady-Fox wrote out a statement for Lees in which she mentioned blood on the machine and on Camilo's hand but did not mention blood on the product. Lees did not request a statement from Camilo.

Brady-Fox was later interviewed by Andrea Salzman, employee services representative. Salzman, no longer employed by Respondent did not testify. Salzman's notes indicate an intent to build a case against Camilo.<sup>4</sup> Salzman interviewed Brady-Fox but did not speak with Camilo. In her account of her meeting with Brady-Fox, Salzman contends that Brady-Fox observed and pointed out blood on the product to Camilo. I need not and do not credit such evidence. First, Brady-Fox did not mention blood on the product in her uncoerced statement given to Lees. Second, if there was blood on the product, that was so important, Brady-Fox clearly would have mentioned it; and third if there was blood on the product and Brady-Fox had not reported it to

<sup>&</sup>lt;sup>4</sup> I admitted Salzman's notes under Federal Rules of Evidence Rule 803 (6). However, I need not, and do not, credit Salzman's self-serving notes. Salzman's notes appear to be written in an attempt to defend the discharge in the event Camilo sought to file a grievance under the Respondent's internal grievance procedure.

supervision, as required by Respondent's good manufacturing practices, Brady-Fox would have received a warning. As will be discussed more fully below, Respondent's willingness to excuse Brady-Fox leads to a conclusion that the purpose of Salzman's "investigation" was to build a case against Camilo.

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On April 21, Respondent discharged Camilo for "intentional product contamination." Lees did not recommend that Camilo be discharged and, in fact, Lees was not consulted about the discharge. While Respondent concedes that Camilo did not intend to contaminate its product, it contends that by intentionally placing his hands in the almonds after learning of the blood on his hands, Camilo committed an intentional act, violative of the rule. General Counsel contends that Camilo's conduct was negligent and not intentional. General Counsel contends that Camilo's misconduct should have been treated as a failure to comply with the good manufacturing practices, which would have only resulted in a warning. Although Brady-Fox violated the good manufacturing practices, she was not given a warning or even a coaching.

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Respondent, after discovering blood on its machine took the proper steps to insure that no almond product was contaminated. The machine was stopped and sterilized. All product that could have been contaminated was isolated and then destroyed.

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Alma Orozco has worked for Respondent for over 30 years. Orozco had never been disciplined prior to the coaching at issue herein. Orozco was active in the Union organizing drive, wore a Union t-shirt and was listed as a member of the Union organizing team. On May 2, while doing morning stretching exercises before her shift, Orozco sang the words "mighty, mighty, Union." Later that day she was called to a meeting with Salzman, Plant Manager Janet Hills, and Orlousky, her supervisor. The managers, who were not present for this incident, accused Orozco of having said that "everyone should do exercises for the Union", "this is bullshit," and "money, money, money." Orozco denied the allegations but admitted to singing not "money, money, money" but rather "might, mighty, Union." Hills claimed that Orozco had intimidated other employees. Orozco answered that employees had been permitted to talk about anything at work and that there was no rule against talking about the Union. Orozco testified that she has sung and danced before during the morning stretching exercises. Orlousky admitted that employees often speak in a loud voice because the plant is noisy. The written coaching stated, inter alia, "You did say that during exercises you loudly said mighty, mighty, union. This is considered to be intimidating to others and will not be tolerated in the workplace."

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George Johnson, director of employee services, testified that Respondent decided discipline was not necessary. Johnson testified that a coaching was necessary because another employee had objected to Orozco's conduct. Johnson did not explain why the reference to mighty, mighty, union was necessary to the coaching. Orlousky had never before given a written coaching. He further testified that this was the first time Hills was present for an investigatory interview. Hills had never before been involved in disciplinary warnings given out by Orlousky. Orlousky did not make any attempt to question the person leading the stretching exercises or any attempt to determine whether the complaint against Orozco was a result of a personal conflict.

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Mike Flores had worked for Respondent since 1985. He was active in the Union drive and was listed as a member of the Union organizing committee. On June 4, Flores directed a crew of four employees, including him, in the packaging, labeling, and palletizing of almond paste. On this

<sup>&</sup>lt;sup>5</sup> Hills no longer employed by Respondent did not testify. It was never explained why Salzman and Hills were present for a coaching about such a minor incident. I draw the inference that they were present because of the Union implications of this incident.

date production was off schedule due to an injury to a crew member. However, by 9:35 a.m., the crew was caught up with production.

During the morning of June 4, Ron Lees walked through the paste room area and did not observe Flores.<sup>6</sup> Lees questioned two employees but they did not know where Flores was. Lees found Flores in an area behind two cabinet doors. The cabinet doors were open in a manner which concealed the space between the cabinets. Lees moved the doors and found Flores sitting there. This occurred shortly before 9:35 a.m.

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Flores' eyes were not shut and Lees admitted that he did not believe Flores was asleep. Lees took Flores to the plant lobby where they could speak privately. Lees asked what Flores was doing and Flores answered that he was resting his eyes. Flores said he was "caught up on his work and was just resting his eyes for three minutes until the next batch of almond paste was ready." Lees told Flores that he could not be hiding during work time and told Flores to go back to work. Lees then called Stockton at his home.

On June 6, Lees and Salzman met with Flores. Flores said that he had a headache on June 4 and that was why he was resting his eyes. Hills had earlier instructed Lees that Flores was to be suspended for "taking a rest during work during work time" Flores was suspended pending investigation. Salzman allegedly undertook an investigation. On June 10, Salzman and Lees terminated Flores. Johnson testified that Doug Gendal, Respondent president, Kim Kennedy, general manager, and Janet Hills made the decision to terminate Flores based on Salzman's report.<sup>7</sup>

The termination letter drafted by Salzman with Lees' signature states that Lees "opened the locker doors and found you sitting down, your back against the wall and your eyes shut. The discharge form also states, "You had [been] previously counseled regarding inappropriate work behavior (sleeping on the job) incident.

The earlier counseling referred to in the termination letter, refers to an incident in April, where supervisor Dwight Davis found Flores sitting with his feet up in the work area. Although Respondent treated this as sleeping on the job to justify the June discharge, in April it did not treat the incident as sleeping on the job but rather as a situation where, Flores although not sleeping, gave the wrong impression. Respondent claimed that Stockton had counseled Flores about sleeping on the job. Stockton concluded that Flores was not sleeping. While Stockton had spoken to Flores in April, he gave Flores no written warning or written coaching, Stockton counseled Flores about sleeping on the job and to stay in his work area. Although Respondent relied on the April coaching, Respondent terminated Flores without contacting Stockton.

Respondent contends that Flores was discharged because he was not doing work and hiding from his supervisor and, because he had been previously counseled by Stockton about not working during work time. Based on Flores' prior incident, Respondent contends that Flores engaged in "a willful disregard of instruction."

Stockton testified that he was told by Lees that Respondent was using the April incident to discharge Flores. Stockton was not contacted by Respondent prior to Flores' termination. Neither Stockton nor Lees recommended that Flores be discharged.

<sup>&</sup>lt;sup>6</sup> Lees was acting as Flores supervisor that day as Ted Stockton manager was on vacation.

<sup>&</sup>lt;sup>7</sup> Gendal, Hills and Kennedy did not testify.

Amado Sabala worked for Respondent for over 2 years. Sabala was a Union supporter and listed as a member of the Union organizing drive. On June 8, Sabala was working on an almond drying machine and shortly before the lunch break Sabala shut down his machine for cleaning. According to Sabala he told employee Walter Avila that he was going to rest inside the machine during the lunch break.<sup>8</sup> Sabala testified that he previously received permission to rest in the machine during lunch from Corral his supervisor. Corral denies giving such permission. I credit Corral.

According to Sabala, he went into the machine to rest his back at 3:30 a.m. and that five minutes later supervisors Kenny McGuire and Debenett Stitt approached the machine. The credible evidence shows that these supervisors found Sabala in the machine prior to 3:30 a.m. McGuire asked Sabala to get out of the dryer. After Sabala exited the machine, McGuire accused Sabala of sleeping in the machine. Sabala contended that he had permission to do so. Sabala was placed on suspension and later discharged for sleeping on the job.

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The credible evidence shows that Paul Renslow, a leadman, saw Sabala sleeping in the dryer at 3:15 a.m. Renslow notified McGuire. McGuire and Stitt went to the dryer and saw Sabala sleeping. When McGuire questioned Sabala about this incident, Sabala stated that he had permission to take his lunch period at anytime. That testimony is not credited. Corral denied that he gave Sabala permission to rest his back or sleep in the machine. The safety risk would be too great for Corral to permit such conduct. Sabala could sleep during his lunch break but it would have to be in the cafeteria or his car and not in a work area. Sabala was suspended pending an investigation. McGuire recommended that Sabala be discharged for sleeping on the job. In the past, McGuire had ceased using an employee from a sub-contractor because that employee was sleeping on the job. On June 14, Sabala was discharged for sleeping on the job.

# C. Conclusions

1. The independent Section 8(a)(1) allegations

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a. Threats of loss of wages and benefits

As mentioned above, Davis told employees that if the Union came in, the employees would probably not receive the raise scheduled for September 2005 because the raise would be under negotiation. Davis said that as a result of negotiations employees' wages could go up or down. On another occasion, Davis stated that if the Union came in, the employees might not get their raises. Davis testified that he told employees that Respondent would freeze wages and benefits if they selected the Union as their bargaining representative. Davis read a flier which stated that Respondent had "determined that a wage rate change is appropriate" and that employees would receive the increase some time that summer. According to Davis, he stated, "It's my understanding if the Union comes in, it would go to collective bargaining, we would have to freeze everything because it would be considered a bribe, and once it gets to collective bargaining, you need to understand it can go up or down."

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While no amount has been announced, the employees had been notified of a scheduled pay increase in September. Davis told the employees that if the Union was selected that existing benefit would be lost. The Board has held that an employer's threat to withhold employees' scheduled wage increases if they select the union as their bargaining representative

<sup>&</sup>lt;sup>8</sup> Avila did not testify. Respondent contends that it checked with Avila who denied knowledge that Sabala intended to rest during his lunch break.

is in violation of Section 8(a)(1) of the Act. *More Truck Lines*, 336 NLRB 772 (2002); *Smithfeld Packing Co.*, 344 NLRB No. 1 (2004). Further, Respondent's threat to "freeze" employees' wage levels and deny them their scheduled wage increases if the Union were voted in violated Section 8(a)(1) of the Act. *More Truck Lines*, *supra*; *Superior Emerald Park Landfill*, 340 NLRB No. 54 (2003). Davis could lawfully tell employees that wages could go up or down but he could not threaten or imply that employees would be deprived of existing benefits if they voted for the Union.

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I find that area manager Don King threatened that employees would lose their benefits if the Union came in. King said, "You would lose everything. It's all re-negotiable." King said that if the Union came in, employees would lose their wages and pension. Finally, King stated that if the Union got in, the plant would close its doors. Accordingly, I find that Respondent threatened a loss of benefits and plant closure if the employees selected the Union as their representative.

During a conversation with supervisor Ron Lees, Ivo Camilo stated that the employees had not had a raise for some time and that Camilo felt that his \$10 per hour was the equivalent of minimum wage. Lees answered, "Well. If the Union gets in you can worry about it, if the Union succeeds worry about the job, mine included." I find that Lees unlawfully threatened loss of employment if the employees selected the Union as their representative.

Employee Ann Hurlbut testified that in April test room supervisor Janice Peterson called her into a meeting with three other employees. Peterson said that the Union had raised its ugly head again and was trying to organize Respondent. Peterson said that if the Union came in, Respondent would take away wages and benefits and that bargaining would start from nothing, everything would be negotiated. Peterson added that employees could wind up with less in wages and benefits than they currently received. Accordingly, I find that Respondent threatened a loss of wages and benefits if the employees selected the Union as their representative.

#### b. Allegations of Interrogation

In mid-February Corral asked Sabala and Marcus Johnson if anyone approached the employees about signing anything for the Union. Johnson said he had heard bits and pieces about the Union and then left. Sabala mentioned that he had been a Union member in the past. Corral asked whether the Union had sent Sabala and. Sabala answered no.

The Board's test for determining whether interrogation of employees concerning their union activities or the union activities of other employees is set out in *Rossmore House*, 269 NLRB 1176, 1177 (1984):

Whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.

The Board has said that a totality of the circumstances test must be applied, even when the interrogation is directed to unit members whose union sympathies are unknown to the employer. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Some of the considerations taken into account by the Board in determining whether, under the totality of the circumstances, the interrogation was coercive include: Whether the employee interrogated was an open and active union supporter; whether there is a history of employer hostility towards or discrimination against union supporters, whether the questions were general and non-threatening, and whether the management official doing the questioning had a casual and friendly relationship with employee being questioned. *Sunnyvale Medical Clinic*, supra at 1218.

I find that this interrogation of Sabala and Johnson by Corral, violated Section 8(a)(1) of the Act. There was no evidence that Johnson was an active union adherent. The conversation took place prior to the time that Sabala became identified as an active union supporter. Moreover, the questions went beyond the employees' union activities, if any, and sought information about the union activities of other employees that Sabala and Johnson might be aware of. Combined with the Respondent's numerous unfair labor practices, I find this questioning tended to restrain and coerce employees in violation of Section 8(a)(1).

Employee Alma Orozco testified that supervisor Matt Orlousky asked what she thought about the Union. Orozco answered that her young daughter received better benefits than she even though she, Orozco, had worked for the Employer for several years. This conversation took place prior to the time Orozco became identified as an active Union supporter. In the context of Respondent's other unfair labor practices, I find that this questioning tended to restrain and coerce employees in violation of Section 8(a)(1) of the Act.

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At a meeting with four employees, Peterson asked what the employees thought about the Union and Hurlbut answered, "If the election was held tomorrow, I would vote yes for the Union." I find by this conduct, in the context of unlawful threats by Peterson, Respondent violated Section 8(a)(1) of the Act.

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# c. Statements Regarding Pension Benefits

Supervisor Kathy Manzer told employees during a meeting in February that "employees who were members of a collective-bargaining agreement would not be able to participate in the pension plan." She also told the employees that the "benefits that they had at the time of union representation would be frozen at that time, and then would be negotiated, that the pension plan as they knew it would no longer exist, based on the information I had from the company." Manzer handed out a flier which included the following question and answer:

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Q: Will I be eligible to continue participation in Blue Diamond's pension plan if I am represented by a union?

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A: No. Blue Diamond's pension plan has a provision about who is eligible to participate in the plan. It says, ". . . . the following classes of employees shall not participate in the plan. . . . . an employee who is a member of a collective bargaining unit. . . . ".

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Supervisors Orlousky, Stockton and Tanaka made similar statements that employees in a collective-bargaining unit were not eligible for Respondent's pension plan. They never mentioned that the Union could negotiate that the employees retain that existing pension benefit. Rather, the supervisors threatened that the existing benefit would be lost. They threatened that the existing benefit would be replaced by a union plan which would not vest for five years. Respondent violated Section 8(a)(1) of the Act by "the suggestion inherent in the exclusionary language that unrepresented employees will forfeit the plans' benefits if they choose union representation." Ryder *Truck Rental*, 341 NLRB No. 109 (2004) citing *Handleman Co.*, 283 NLRB 451, 452 (1987). See also *Lynn- Edwards Corp.*, 290 NLRB 202, 205 (1988) ("It is well settled that an employer violates Section 8(a)(1) through a provision in, or a statement about, a plan that suggests that coverage of employees will automatically be withdrawn as soon as they become represented by a union or that continued coverage under the plan will not be subject to bargaining.").

# d. Statements Regarding Plant Closure

In March, supervisor Martin Basquez told Camilo that if the Union got in, the Employer would change its name or move. In April, Basquez asked Larry Newsome and Alex Cabalona why they were wearing Union t-shirts and then said, ""you know if the Union comes in they have the right to fold up or shut the plant and relocate." Basquez then walked away. Basquez made similar statements to family members who were employed by Respondent. I find that by these statements Respondent unlawfully threatened employees with plant closure and loss of employment in violation of Section 8(a)(1) of the Act.

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During meetings with employees, when an employee asked whether the plant would close down if the employees selected the Union, Davis responded "anything's possible." According to Davis, he made this comment on more than one occasion. I find by this conduct Respondent impliedly threatened employees with plant closure if the employees selected the Union as their representative. *Brunswick Food & Drug*, 284 NLRB 663, 680-681 (1987).

# e. Alleged Violations by Scott Moore

Employees Geri Daveiga and Dora Wagner testified that in April, leadman Scott Moore threatened that if the union came in, the Employer would shut down. Moore admitted that he told these employees that Respondent might move out of Sacramento, if the Union came in. Moore also admitted asking employees, in this conversation, what their problems were at work and writing down a list of their concerns. Moore told the employees he would take the list to his department manager.

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Moore is a leadman and General Counsel contends that he is a supervisor within the meaning of the Act. Respondent contends that Moore is not a supervisor and that it cannot be held liable for his statements.

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In April, Moore was leadman over 30 employees. Moore assigns work tasks to and trains employees. The assignments were made on a rotational basis. Moore can edit time cards but he does not approve them. Moore had the authority to approve vacation requests and to permit employees to leave work early. Moore did not issue discipline but helped compose disciplinary notices and sat in on disciplinary meetings. He would interview job applicants along with the supervisors. The hiring decisions would be made by the supervisors.

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Supervisory status under the Act depends on whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, which defines the term "supervisor" as:

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The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

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In discussing the above statutory definition, the Sixth Circuit declared that Section 2(11) is to be interpreted in the disjunctive and that "the possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). See also *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002) *Mfg. Co.*, 169 F.2d 571 (6th Cir.

1948), cert. denied 335 U.S. 908 (1948); *Harborside Healthcare Inc.*, 330 NLRB 1334 (2000); *Pepsi-Cola Co.*, 327 NLRB 1062 (1998); *Allen Services Co.*, 314 NLRB 1060 (1994); and *Queen Mary*, 317 NLRB 1303 (1995).

As the party alleging supervisory status, the General Counsel bears the burden of demonstrating that status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711–712 (2001); *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999); *Alois Box Co., Inc.*, 326 NLRB 1177 (1998), and *Youville Health Care Center, Inc.*, 326 NLRB 495 (1998).

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The record reveals that Moore does not have authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them or to adjust their grievances or to effectively recommend such action. While Moore assigns work, the assignments are made on a rotational basis and do not require independent judgment. His duties regarding timecards do not require independent judgment. While Moore can approve vacation requests and time off, any decisions regarding disapproval are made by the supervisors. While Moore participates in hiring and disciplinary meetings, authority is exercised by the supervisors not Moore. The evidence shows that Moore's responsibilities in those areas are routine and do not require the exercise of independent judgment. See Los Angeles Water & Power Employees' Association, 340 NLRB no. 146 (2003); PECO Energy, 322 NLRB 1074 (19970; Chrome Deposit Corp., 323 NLRB 961 (1997). Accordingly, I find that General Counsel has not established that Moore was a supervisor within the meaning of Section 2(11) of The Act or that Respondent was liable for his statements regarding the Union.

# f. May 5 Meeting with Cesario Aguirre held by Basquez, Ford and Silva

On May 5 leadman Eugene Spyksma called Aguirre into a meeting with Basquez, Dan Ford, and Chris Silva. Basquez handed Aguirre a flier about the Union. Basquez asked if there was anything that could change Aguirre's mind. Aguirre answered that he did not think so. Basquez and Aquirre then discussed Aquirre's unhappiness with his loss of benefits. Basquez stated that Aguirre should have resolved these issues prior to returning to work. Aguirre answered that Respondent had not been fair. Aguirre mentioned that he favored the Union even before his accident and Ford asked what Aguirre thought the Union could do for him. Aguirre answered better treatment and better wages. Ford answered that if the Union came in, negotiations start and everything starts from zero. Ford then asked whether Aguirre was willing to take that chance. Ford said if the Union comes in, it will drive away the growers. Aguirre said he was willing to take that risk. Silva asked whether Aguirre was willing to risk his pension. Ford said, if the Union comes in, the employees' pension will freeze immediately. Aguirre did not respond. Aguirre spoke about employee unhappiness with certain company policies. The supervisors said the company was working on that and Ford stated that there would be a substantial wage increase in September. Silva asked Aguirre how the employee would vote, if the election were held the next day. Aguirre said he would vote against it because "we are not ready for an election." I find that in this conversation Basquez unlawfully interrogated Aguirre about his union sympathies. Further, Basquez and Ford unlawfully threatened a loss of benefits if the employees choose the Union as their bargaining representative. Neither Basquez nor Ford disavowed Silva's threat.

#### 2. The discharge of Ivo Camilo

In cases involving dual motivation, the Board employs the test set forth in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). Initially, the General Counsel must establish by a preponderance of

the credible evidence that anti-union sentiment was a "motivating factor" for the discipline or discharge. This means that General Counsel must prove that the employee was engaged in protected activity, that the employer knew the employee was engaged in protected activity, and that the protected activity was a motivating reason for the employer's action. *Wright Line, supra,* 251 NLRB at 1090. Unlawful motivation may be found based upon direct evidence of employer animus toward the protected activity. *Robert Orr/Sysco Food Services,* 343 NLRB No. 123, slip op. at 2 (2004). Alternatively, proof of discriminatory motivation may be based on circumstantial evidence, as described in *Robert Orr/Sysco Food Services,* supra:

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To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity. *Embassy Vacation Resorts*, 340 NLRB No. 94, slip op. at 3 (2003).

When the General Counsel has satisfied the initial burden, the burden of persuasion shifts to Respondent to show by a preponderance of the credible evidence that it would have taken the same action even in the absence of the employee's protected activity. If Respondent advances reasons which are found to be false, an inference that the true motive is an unlawful one may be warranted. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9<sup>th</sup> Cir. 1966); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6<sup>th</sup> Cir. 1982). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992). Ultimately, the General Counsel retains the burden of proving discrimination. *Wright Line*, supra, 251 NLRB at 1088, n. 11.

Ivo Camilo was a 35-year employee with an excellent work history. First, Camilo was engaged in Union activity and Respondent was aware of that activity. Camilo was listed as a member of the Union's organizing committee and Camilo's support of the Union was well known by his supervisor Ron Lees. On April 15, Camilo participated in the rally at Respondent's facility and his name was listed as a member of the Union's organizing committee.

On April 18, Camilo committed a violation of Respondent's "Good Manufacturing Practices." When shown blood on his finger or hand, Camilo took steps to stop the bleeding and wipe the blood, but he failed to report the incident to a supervisor, stop the machine, attend to his cut or scratch, have the machine sterilized and have the product isolated. Janet Brady-Fox also failed to take the proper steps dictated by the good manufacturing practices. Respondent choose to treat Camilo's offense as an intentional offense, intentional product contamination rather than as a violation of its good manufacturing practices (which would have resulted in a warning). However, Respondent chose not to give Brady-Fox, not known as a union adherent, any discipline, not even a coaching. When Brady-Fox originally gave a report to Respondent regarding this incident she did not report blood on the almond product. It was not until an interview, which I find highly suspicious, by Andrea Salzman from employee services, that Brady-Fox mentioned blood on the almond product. As mentioned above, I do not credit Salzman's report or Brady-Fox's testimony that blood was seen on the almond product. While Salzman interviewed Brady-Fox, she never interviewed Camilo. I also note that Lees, Camilo's supervisor was not consulted about this discharge. Under these circumstances, I find that General Counsel has established a prima facie case that Camilo was discharged, rather than being given a disciplinary warning, because of his union activities.

Thus, the burden shifts to Respondent to establish that the same action would have taken place in the absence of the employee's union activities. Where, as here, General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991). An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Betrand Dupont, Inc.*, 271 NLRB 443 (1984).

As stated above, Camilo violated Respondent's good manufacturing practices and under its rules of conduct would have received a written warning. Respondent contends that Camilo's conduct in placing his hands in the almonds after learning of blood on his finger or hand makes this an intentional act regardless of Camilo's motive. Respondent's hostility towards Union activity evidenced by its numerous unfair labor practices casts great doubt on its motivation. Further, the glaring disparate treatment between Brady-Fox and Camilo leads me to conclude that Respondent's motive was to build a case against Camilo and to rid itself of a union adherent.

Respondent contends that Brady-Fox was not disciplined because she did not normally work in that department, she feared retaliation from Camilo, and she reported the injury to Camilo. I find these reasons especially unpersuasive. While Brady-Fox did not normally work in that area, the employees are all trained that if there is such an injury, the injury is to be taken care of and reported to supervision. The machine is to be stopped and sterilized. The product is to be isolated so that that any possible contaminated product can be destroyed. Brady-Fox, like Camilo and all other employees received such training. I simply do not credit the testimony that Brady-Fox feared retaliation from Camilo. There is no suggestion that she recommended to Camilo that they take the proper good manufacturing practices. The contention that Brady-Fox was relieved of her duties because she reported the incident to Camilo is nonsensical. Respondent's rules require reporting such an incident to a supervisor. Further, reporting a violation to the person who committed the violation and who took inadequate measures clearly does not insure compliance with the good manufacturing practices. Thus, after Camilo failed to take adequate measures, Brady-Fox was required to report the incident. I can only infer that she was given a pass because Respondent was more interested in building a case against Camilo than it was in enforcing its good manufacturing practices.

Thus, I find that Respondent has failed to establish that Ivo Camilo would have been discharged in the absence of his union activities. Accordingly, I find that Respondent violated Section 8(a)(3) and (1) by discharging Ivo Camilo in order to discourage union activities.

# 3. The Written Coaching Given to Alma Orozco

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Alma Orozco has worked for Respondent for over 30 years. Orozco had never been disciplined prior to the coaching at issue herein. Orozco was active in the Union organizing drive, wore a Union t-shirt and was listed as a member of the Union organizing team. On May 2, while doing morning stretching exercises before her shift, Orozco sang the words "mighty, mighty, Union." Later that day she was called to a meeting with Salzman, Plant Manager Janet Hills, and Orlousky, her supervisor. The managers, who were not present for this incident, accused Orozco of having said that "everyone should do exercises for the Union', "this is bullshit," and "money, money, money." Orozco denied the allegations but admitted to singing not "money, money, money" but rather "might, mighty, Union." Hills made a vague claim that Orozco had intimidated other employees. Orozco answered that employees had been permitted to talk about anything at work and that there was no rule against talking about the Union. Orozco testified that she has sung and danced before during the morning stretching exercises. Orlousky admitted that

employees often speak in a loud voice because the plant is noisy. The written coaching stated, inter alia, "You did say that during exercises you loudly said mighty, mighty, union. This is considered to be intimidating to others and will not be tolerated in the workplace." Orozco was active in the Union and Respondent was well aware of it. In fact Orozco was disciplined for singing the words "mighty, mighty, Union" although there was no rule against such conduct. I find that General Counsel has established a prima facie case under *Wright Line*.

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I find that Respondent has failed to establish that Orozco would have been disciplined in the absence of her union activities. None of Respondent's supervisors were present for the alleged offense and they never spoke to the person in charge. Respondent contended that there was some vague complaint against Orozco but could not adequately explain Respondent's actions. Respondent has not shown that Orozco's conduct lost the protection of the Act. Nor could Respondent explain, other than the Union implications, why the plant manager was present for this coaching. Respondent contends that this coaching is not discipline. That defense is rejected. The record reveals instances, such as the case of Mike Flores, where Respondent relied on coachings to determine the extent of subsequent discipline. Accordingly, I find that Respondent violated Section 8(a)(3) and (1) by issuing a written coaching to Orozco in order to discourage union activities.

### 4. The Discharge of Mike Flores

Mike Flores had worked for Respondent since 1985. He was active in the Union drive and was listed as a member of the Union organizing committee. Flores was discharged during Respondent's campaign of unfair labor practices. Flores was discharged for conduct which on its face would normally mandate a written warning. During the morning of June 4, Ron Lees walked through the paste room area and did not observe Flores. Lees questioned two employees but they did not know where Flores was. Lees found Flores in an area behind two cabinet doors. The cabinet doors were open in a manner which concealed the space between the cabinets. Lees moved the doors and found Flores sitting there.

Flores eyes were not shut and Lees admitted that he did not believe Flores was asleep. Lees took Flores to the plant lobby where they could speak privately. Lees asked what Flores was doing and Flores answered that he was resting his eyes. Flores said he was caught up on his work and was just resting his eyes for three minutes until the next batch of almond paste was ready. Lees told Flores that he could not be hiding during work time and told Flores to go back to work. Lees did not suspend Flores but was instructed by Hills to do so. Hills intervention in this discipline is suspicious.

On June 6, Lees and Salzman met with Flores and suspended Flores. Neither Lees nor Stockton, Flores' supervisor, recommended suspension or discharge. Salzman allegedly undertook an investigation. Salzman did not speak with Flores or Stockton. On June 10 Salzman and Lees terminated Flores, Doug Gendal, Respondent president, Kim Kennedy, general manager, and Janet Hills made the decision to terminate Flores based on Salzman's report. None of these managers testified to explain their reasoning.

Flores' offense of loafing or not being at his work station was termed sleeping on the job even though Lees admitted that Flores was not sleeping on the job. Further, Respondent relied on an oral coaching to justify escalating this offense from a warning to a discharge. First, in the Orozco incident, Respondent argued that a coaching is not discipline. Second, Respondent did not speak with Stockton to determine the nature of the oral coaching. Thus, I find that General Counsel has established a prima facie case that absent his union activities, Flores would have received a written warning but not been discharged for his conduct in June 4, 2005.

Thus, the burden shifts to Respondent to establish that the same action would have taken place in the absence of the employee's union activities. Where, as here, General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991). An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Betrand Dupont, Inc.*, 271 NLRB 443 (1984).

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Respondent contends that Flores was discharged because he was not doing work and hiding from his supervisor and because he had been previously counseled by Stockton about not working during work time. Based on Flores' prior incident, Respondent contends that Flores engaged in "a willful disregard of instruction." Respondent's argument of willful disregard of instruction seems contrary to its warning system which allows employees three written warnings in 12 months or six written warnings in 36 months. By using the terminology "willful disregard of instruction", Respondent was escalating its established warning system to justify Flores' discharge. Further, Respondent never contacted Stockton to determine the nature of the oral coaching given to Flores. Moreover, to further exaggerate Flores' misconduct, Respondent referred to "sleeping on the job" when neither the June incident nor the prior incident in April involved sleeping on the job. Accordingly, I find that Flores would have received a written warning absent his union activities and that Respondent has failed to establish that Flores would have been discharged absent his union activities.

#### 5. The Discharge of Amado Sabala

Amado Sabala worked for Respondent for over 2 years. Sabala was a Union supporter and listed as a member of the Union organizing drive. He told Corral, his supervisor, that he used to be a member of the Union. Sabala was discharged during Respondent's campaign of unfair labor practices.

On June 8, Sabala was working on an almond drying machine. Shortly before the lunch break, Sabala shut down his machine for cleaning. The credible evidence shows that Renslow, McGuire and Stitt found Sabala in the drying machine prior to the 3:30 am lunch break. McGuire asked Sabala to get out of the dryer. After Sabala exited the machine, McGuire accused Sabala of sleeping in the machine. Sabala contended that he had permission to do so. Respondent investigated and found that neither supervisor Corral nor employee Avila corroborated Sabula's story. Sabala was placed on suspension and later discharged for sleeping on the job. Under Respondent's rules of conduct sleeping on the job is cause for immediate suspension and probable termination. Even assuming that General Counsel established a prima facie case under Wright Line, I find that Respondent has established by credible evidence that Sabala would been discharged for sleeping on the job absent his union activities. Accordingly, I recommend that this allegation of the complaint be dismissed.

Conclusions of Law

- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
  - 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

- 3. By threatening employees with loss of scheduled wage increases, loss of benefits, and loss of pension benefits, Respondent violated Section 8(a)(1) of the act.
- 4. By threatening plant closure and loss of employment, Respondent violated Section 8(a)(1) of the Act.
  - 5. By coercively interrogating employees about their union activities and union sympathies, Respondent violated Section 8(a)(a) of the act.
- 6. By discharging employees Ivo Camilo and Mike Flores and warning employee Alma Orozco, in order to discourage union activities and union membership, Respondent violated Section 8(a)(3) and (1) of the act.
- 7. The above unfair labor practices above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
  - 8. Respondent did not otherwise violate the Act as alleged in the complaint.

#### The Remedy

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Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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Respondent having discriminatorily discharged Ivo Camilo and Mike Flores, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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Respondent must also be required to expunge any and all references to its unlawful discharges of Camilo and Flores, and its unlawful warning to Alma Orzco, from its files and notify Camilo, Flores and Orozco in writing that this has been done and that the unlawful discipline will not be the basis for any adverse action against them in the future. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

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Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended<sup>9</sup>

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**ORDER** 

Respondent, California Almond Growers Exchange d/b/a Blue Diamond Growers, its officers, agents, successors, and assigns, shall:

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1. Cease and desist from:

<sup>&</sup>lt;sup>9</sup> All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- a. Threatening employees with loss of scheduled wage increases, loss of benefits, and loss of pension benefits, in order to discourage union membership or activities.
- b. Threatening employees with plant closure and loss of employment, in order to discourage union membership or activities.
- c. Coercively interrogating employees about their union activities and union sympathies.

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- d. Discharging employees and disciplining employees, in order to discourage union activities and union membership.
- e. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act:
  - a. Within 14 days from the date of this Order, offer Ivo Camilo and Mike Flores full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed but for their unlawful discharges.
  - b. Make Ivo Camilo and Mike Flores whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of the decision.
  - c. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Camilo and Flores, and the unlawful warning given to Alma Orzco, and within 3 days thereafter notify them in writing that this has been done and that the discipline will not be used against them in any way.
  - d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
  - e. Within 14 days after service by the Region, post at its facility in Sacramento, California copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to

<sup>&</sup>lt;sup>10</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

5		ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2005.		
10	f.	Within 21 days after service by the Registre sworn certification of a responsible offic attesting to the steps that the Responde	ial on a form provided by the Region	
15	Dated	I, Washington, D.C. March 17, 2006		
20			Jay R. Pollack Administrative Law Judge	
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#### **APPENDIX**

#### NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, and has ordered us to post and abide by this notice

The National Labor Relations Act gives all employees the following rights:

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT threaten you with loss of scheduled wage increases, loss of benefits, and loss of pension benefits, in order to discourage union membership or activities.

We WILL NOT threaten you with plant closure and loss of employment, in order to discourage union membership or activities.

WE WILL NOT interrogate you about your union activities and union sympathies or the activities or sympathies of your fellow employees.

WE WILL NOT discharge employees or discipline employees, in order to discourage union activities and union membership.

WE WILL NOT In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Ivo Camilo and Mike Flores full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed but for their unlawful discharges.

WE WILL Make Ivo Camilo and Mike Flores whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL remove from our files any reference to the unlawful discharge of Camilo and Flores, and the unlawful warning given to Alma Orzco, and WE WILL NOT make reference to the permanently removed materials in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker and we will not use the permanently removed material against these employees.

		California Almond Growers Exchange d/b/a Blue Diamond Growers	
		(Employer)	
Dated	Ву		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov">www.nlrb.gov</a>.

901 Market Street, Suite 400 San Francisco, California 94103-1735 Hours: 8:30 a.m. to 5 p.m. 415-356-5130.

# THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUSTNOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THISNOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 415-356-5139